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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court of Arizona

Brief for Amicus Curiae State of California on Behalf of Respondents

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INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA

Petitioners have ably established the importance of this case to the State of Arizona. The same problem that exists in this case also appears along the California side of the Colorado River as well as in other navigable rivers in California and other States of the Union. The question of major importance to California is the ownership of the natural bed of a navigable waterway, such as the Colorado River, when it becomes dry due to the activities of the United States or any other lawful agency. Presently there are several lawsuits pending in

which California is claiming ownership of such lands made dry due to channelization of the Colorado River by the United States Bureau of Reclamation. Resolution of this matter will assist the states in settling these cases.

The lands along the Colorado River are becoming ever more popular and valuable for recreational uses. As this occurs, the question of land ownership becomes more important. The resolution of the legal questions by this Court raised in the instant case will aid California, as well as all states having similar problems with navigable rivers, to resolve expeditiously these title questions. In this way there may be orderly development, including preservation of these vast recreational areas.

STATEMENT OF THE CASE

The following is a summary of the facts in the instant case as stated in the Agreed Statement of Facts and Issues. (Appendix pp. 6-18.)

This is a quiet title action to the land described as follows:

> Lot 1, the S ½ NE ¼ and the SE ¼ of Section 3, Township 19 North, Range 22 West, Gila and Salt River Meridian.

Petitioner, Bonelli Cattle Co., acquired title through mesne conveyances from Santa Fe Pacific Railroad Company. Santa Fe received title from a United States Patent dated November 5, 1910, pursuant to Act of Congress July 27, 1866 "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast . . ." At the time of the grant to Santa Fe, the property in question *was not riparian land along the Colorado River.*

The Colorado River between 1906, the date of the original survey of said lands, and 1959, the date of channelization of the river, moved eastward through natural causes. By 1954, the river covered most of the property here involved. During the winter of 1959 and the early part of 1960, the United States Bureau of Reclamation channelized and stabilized the Colorado River, thereby confining the river to the western part of the land in question. For a pictorial representation of the position of the river in 1906, 1960 and after channelization, see petitioner's brief page 54. The channelization of the Colorado River left the land in question dry and usable. The present controversy then arose.

The Supreme Court of Arizona held that the part of the former riverbed made dry by the actions of the Bureau of Reclamation belonged to the State of Arizona. *State v. Bonelli Cattle Co.*, 489 P.2d 699 (1971), *rehearing denied*, 495 P.2d 1312 (1972).

QUESTIONS PRESENTED

While the petitioners contend that there are six questions before this Court, amicus curiae State of California contends that they may be summarized as follows:

1. When a navigable river is rechannelized leaving a portion of the natural bed dry, does the state or the riparian owner have title to the former bed?

2. Did the closing of Hoover Dam fix the position of the Colorado River for boundary purposes?

The position of the State of California is that the state retains title to lands uncovered by channelization, and that the closing of Hoover Dam did *not* fix the position of the river for boundary purposes.

ARGUMENT

INTRODUCTION

Each state holds the lands underlying navigable waters in trust for all the people of that state, and subject to the navigational servitude retained by the federal government. The state's trust encompasses the traditional uses of commerce, navigation and fisheries as well as ownership of the bed. The nature of this trust in California has recently been reiterated in *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P.2d 374 (1971). In *Marks*, the Court noted "the public uses to which tidelands are subject are sufficiently flexible to encompass changing needs." While *Marks* spoke of the tidelands trust, the same trust is applicable to all lands underlying navigable waters. *Illinois Central RR v. Illinois*, 146 U.S. 387, 436-37 (1892). This trust is a restriction upon the state's use of such lands even though they have been reclaimed and are dry. *See City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482-83, 476 P.2d 423 (1970).

If, as we contend, the State of Arizona retains title to the subject lands, said title is held subject to the public trust. These lands, which are adjacent to the river are most useful to provide access to the river for boating, fishing, or other recreational purposes, as well as possible uses relating to commerce. Therefore, the state does not own these lands merely for the purpose of having a bed for a river, but for all trust purposes.

The location and inventory of the public trust lands is essential to their proper administration. This case deals precisely with this problem, namely the application of principles concerning ownership of beds of navigable rivers when an artificial change has been made.

The artificial change in this case was the narrowing of the flowing stream by dredging and channelization by the United States Bureau of Reclamation in exercise of the federal navigational servitude. California submits that the rules applicable to ownership in the event of avulsion or artificial change in the location of a river bed are well established and applicable here.

I

The Arizona Court Reached the Proper Conclusion Concerning River Boundaries When the Course of the River Moves

Petitioners make much of the fact that the Arizona Supreme Court apparently used state, rather than federal laws, to determine this case. However, the main question, *i.e.*, who owns the dry riverbed after channelization, is answered the same way whether federal law or state law is applied. In either situation the State of Arizona would be the owner of the land in dispute. *See* Memorandum for the United States as amicus curiae filed January 3, 1973.

A. Common Law

Before discussing the legal principles concerning channelization of the river in the instant case, it is necessary that the legal definition of, and distinctions between various terms be understood. These terms are equally applicable to federal and state rules.

The term "*accretion*" denotes the process whereby the area of littoral or riparian land is increased by the gradual and imperceptible deposit of sand, soil or other solid material upon the margin of the water. Although the word "*alluvion*" (sometimes spelled "alluvium") is usually applied to the deposit itself, as distinguished

from the act, it is often used synonymously with "accretion."

"Erosion," or the converse of accretion, is the gradual wearing away or loss of land bordering on a body of water or watercourse by the action of the water.

"Reliction" (sometimes "dereliction") is the process whereby land that had been covered by water becomes uncovered or exposed by the imperceptible recession of the water (*i.e.*, the lowering of the water level); although frequently used interchangeably with "alluvion," the term "reliction" in its precise legal meaning refers to land uncovered by gradual exposure rather than land building up on the bottom, shore or bank. Many authorities hold that the recession must be permanent in order to constitute reliction.

"Submergence," or the converse of reliction, denotes the disappearance of land under water and the formation of a navigable body of water over it.

Accretion, erosion, reliction and submergence generally all involve what are legally characterized as "gradual and imperceptible" changes. They are distinguished from *"avulsion,"* which is (1) the more rapid, perceptible and often violent removal of or addition to land due to the action of water, or (2) the sudden natural or artificial change in the bed or course of a river.

Regarding definitions of these terms generally, *see:* 56 Am. Jur. Waters §§ 476, 477, pp. 891-95; III *American Law of Property* (Casner ed. 1952) § 15.26, pp. 855-56; *Black's Law Dictionary* (Rev. 4th ed. 1968) 36-37, 102, 173-74, 529, 530, 647, 1455, 1594; *Ballentine's Law Dictionary* (3d ed. 1969) 14, 64, 116, 339, 414, 1085, 1229; 6 Powell, *The Law of*

Real Property (3d ed. 1939) § 983, pp. 607-11; 5A Thompson, *Commentaries on the Modern Law of Real Property* (1957 Repl.) §§ 2560-63, pp. 599-619; 4 Tiffany, *The Law of Real Property* (3d ed. 1939) § 1219, pp. 613-15.

The rules of law relating to boundary changes when a river changes its course are stated in *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918).

> ". . . It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. New Orleans v. United States, 10 Pet. 662, 717; Jefferis v. East Omaha Land Co., 134 U.S. 178, 189; Nebraska v. Iowa, 143 U.S. 359, 361, 367, 370; Missouri v. Nebraska, 196 U.S. 23, 34-36."

Applying the above stated rules of law to the instant situation, it is apparent that the Supreme Court of Arizona reached the proper conclusion. As expressly admitted by the petitioners, the actions of the United States Bureau of Reclamation caused an *avulsive* change along the bed of the Colorado River. (Pet. Brief p.

28.) Since an avulsive change does not alter boundaries, the boundary of the state owned land beneath the Colorado River remained in the same position as before the works of the Bureau.

B. The Results Reached by the Arizona Supreme Court Are the Same as Would Have Been Reached Applying Federal Law

Even applying federal law to the instant case, as argued by the Solicitor General, the State of Arizona would retain title to the land in question. The case of *Marine Ry. Co. v. United States*, 257 U.S. 47 (1921), is directly in point. The land in that case "lay below low water mark until it was filled in by the United States in 1910-1912 by dredging from the bottom of the river and depositing the material on the other side of a riprap wall built on the river bed." The facts are more thoroughly discussed in *Marine Ry. & Coal Co. v. United States*, 265 Fed. 437 (D.C. Cir. 1920). The United States, by grant from Maryland creating the District of Columbia, received title to the Potomac River. The Court of Appeal specifically stated: "The rule is without exception that, so long as the sovereign remains owner of submerged soil, it retains the fee of the soil reclaimed. [Citation.]" In the *Marine Ry. & Coal Co.* case, the dredging operation took place between 1910-1912. In the instant case the period was even shorter, *i.e.*, late winter of 1959 to early 1960. Thus, under federal law, the land in question would belong to the State of Arizona.[1]

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[1]Previously, this Court in *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876), stated, regarding "lands reclaimed by artificial means," that "by the common law, as before remarked, such additions to the land on navigable waters belong to the crown." However, this Court left it for the several states to decide whether it would "be safe to change these doctrines . . ." Arizona, like California, has decided not to change this rule.

II

The Arizona Supreme Court Decision Herein Is Consistent With the Court of Appeals Decision in United States v. Claridge

Petitioners allege the existence of three conflicts between the Arizona Supreme Court Decision and *United States v. Claridge*, 279 F. Supp. 82 (D.C. Ariz. 1966), aff'd 416 F.2d 933 (9th Cir. 1969). They contend that inconsistencies arise in the definition of "high water mark," in the legal effect of dams, and in the legal effect of rechannelization of a riverbed. We submit that none of these inconsistencies exist.

Both the Arizona Court and the Claridge Court use the same definition of "high water mark". Both cite the definition in *Howard v. Ingersoll*, 54 U.S. 410 (13 How. 381) (1851), that the ordinary high water mark is that line reached during ordinary high flow, but not during the flood stages of a river. *See United States v. Claridge, supra*, 416 F.2d 933 (9th Cir. 1969); *State v. Bonelli Cattle Co.*, 495 P.2d 1312, 1314 (1972).

The Court in *Claridge* held that the closing of Hoover Dam had no effect on land ownership along the river. The *Bonelli* Court however, held that "the condition of the Colorado River at or immediately prior to its control by artificial works is the appropriate time for determining the right of the parties, although, of course, evidence of the river's condition thereafter may be illuminating." The reason for this appears in the statement of facts in the Court's first opinion (*State v. Bonelli Cattle Co.*, 489 P.2d 699, 701 (1971)), where the court stated that there had been no significant changes in the river between the closing of the

dam and the channelization by the United States. The *Claridge* Court relied on *Beaver v. United States*, 350 F.2d 4, 11 (9th Cir. 1965). The *Beaver* case was concerned with the effects of the Laguna Dam on the Colorado River. In that case, the trial court "found the building of the dam was an insignificant factor in the subsequent accretion." These three cases may be easily reconciled by adopting a reasonable position which amicus curaie State of California supports and which is implied in the *Beaver* case. Generally, the closing of a dam only affects the flow of a river and keeps it from flooding. The closing of the dam does not cause the river to change its course, and therefore the closing of itself does not cause avulsive changes. If the meanderings of a river still occur, by reason of normal accretion and erosion, the ownership of the littoral property changes accordingly. This follows the normal presumption that changes in a river are gradual and imperceptible. *Hall v. Brannan, etc. Co.*, 158 Colo. 201, 405 P.2d 749, 750 (1965); *Dartmouth College v. Rose*, 257 La. 533, 133 N.W. 2d 687, 689 (1965); *III American Law of Property, supra*, § 15.29, p. 862. However, when as in property close to a dam, it can be shown by evidence that the closing of the dam caused a relatively sudden and perceptible change in the course or bed of the river, the closing then should be considered a man-made avulsive change. In the instant case, there is nothing in the record to show that the closing of Hoover Dam caused the Colorado River to alter its course or bed in the vicinity of the property here involved.

The third conflict between the two cases alleged by petitioner is non-existent, that is, the question of the effects of channelization or dredging. While the language

in the *Claridge case*, quoting from *Beaver v. United States, supra*, recognizes that dredging does not change the "accretion doctrine," the *Bonelli* Court held that the changes were *avulsive*. That the change in the instant case was avulsive is conceded by petitioners at page 28 of their brief. As noted above, this Court has held that dredging and filling similar to that which occurred in the instant case does not change boundaries along a river. *Marine Ry. Co. v. United States, supra.*

III

Petitioners' Other Contentions Are Without Merit

A. The Submerged Lands Act Is Immaterial to the Instant Case

That the various states held title to the lands underlying navigable waters had been long established in the United States before the Submerged Lands Act. (67 Stat. 29.)

> ". . . The act confers rights in three categories of cases: lands under inland navigable waters, tidelands (lands between high-and low-water marks), and lands under the open sea. Insofar as the first two categories are concerned, the act is merely declaratory of existing law and gives legislative expression to the doctrines enunciated by the Supreme Court in a long line of decisions beginning with Martin v. Waddell, 16 Pet. 367 (41 U.S. 1842), and Pollard's Lessee v. Hagan, 3 How. 212 (44 U.S. 1845)."
>
> 2 Shalowitz, *Shore and Sea Boundaries*, 455 (1964).

Furthermore, there is no contention made by the private parties that the original United States patent specifically included the riverbed. In fact, the Colorado River

was some distance from the lands at the time of the patent.

B. There Is No Taking of Private Property

The property in question is a former riverbed owned by the State of Arizona in its sovereign capacity. As with uplands bordering upon tidelands, they are subject to "considerable control" by the state. *See Hughes v. Washington*, 389 U.S. 290, 294, n.3 (1967). The fact that access to the water is cut off by the lawful act of the United States in furtherance of its powers over navigable waters has long been held not to constitute a taking. *See Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912). It should be noted that at the time of the original patent to Santa Fe from the United States, the property in question was not littoral to the Colorado River.

Justice Lockwood in her dissent, 489 P.2d 699, 703-710, bases her conclusion that there is a "taking" on the fact that the plaintiffs, or their predecessor, once owned the land in question and that they have lost their riparian rights. There are at least three rebuttals to this reasoning. First, following petitioners' logic, if the state wished to construct a harbor, recreational facilities or other structures for trust purposes by filling in part of the river, the state would immediately lose title to the land and thus be prevented from exercising the trust. Secondly, if the river had been rechannelized on to lands other than those of petitioners, the former owners of those lands would be riparian, and petitioners would, as in the instant case, not be riparian. Thirdly, the loss of riparian rights, if there was any, was caused by the action of the United States and *not by the State of Arizona*. This situation was specifically

discussed in *United States v. Rands,* 389 U.S. 121, 123 (1967), where this Court stated:

> ". . . Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, South Carolina v. Georgia, 93 U.S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, Gibson v. United States, 166 U.S. 269 (1897); Scranton v. Wheeler, 179 U.S. 141 (1900); United States v. Commodore Park, Inc., 324 U.S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished."

On page 20 of petitioners' brief, they appear to argue that since the land is *now* suitable for agricultural or development purposes, it meets the test of uplands as defined in *Oklahoma v. Texas,* 260 U.S. 606, 628-29 (1923). That case, however, involved the boundary between Texas and Oklahoma along the Red River. The case only incidentally discussed the question of avulsion or accretion. The concern in that case was the bank of the Red River, as defined in the Treaty of 1819 (Stat. 252). The Court merely held that where a river is in a state of nature, the bank thereof is located waterward of lands suitable for agriculture. The State of California agrees that some eleven years after the Colorado River moved from these lands by a man-made avulsive change, they may *now* meet that definition of uplands. This, however, is not the question before this Court. What must be determined is whether these lands were below the high water mark of the river in its *last natural position* prior to the avulsive change. In other words, were these part of the bed of the Colorado River in 1959, before channelization? The State of California submits that they were.

Conclusion

The beds of navigable rivers are owned by the respective states in their sovereign capacities. As the river bed changes slowly and imperceptibly so does the boundary between the adjacent property and the state owned bed. However, when through natural or artificial causes the bed is altered suddenly, the boundary of the old bed remains as it was before the change.

In the instant case, the rechannelization of the Colorado River was an avulsive change and therefore there was no change in the ownership of the old bed. The State of Arizona retained title to the old dry bed as it existed just prior to channelization. This was the holding of the Supreme Court of Arizona and should be affirmed by this Court.

Respectfully submitted,

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